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ABSTRACT

The personal liability of community college administrators and trustees hinges on the judicial interpretation of 42 USC Section 1983, the Civil Rights Act of 1871. That federal statute allows individuals such as students and teachers to recover money damages from those state officials who have violated their federal rights. Addressed to the non-legal-scholar, this paper was designed to inform community college officials of their potential liabilities as public officials and to provide useful background information through a review of pertinent cases. Topics covered include: (1) why sue the official in his individual capacity? (2) the immunity standard prior to 1974; (3) the new standard of official immunity as set forth in Wood v. Strickland; (4) some related issues (what about private junior college officials? who pays the attorneys? what about insurance?). This paper is recommended to all community college officials concerned about the constitutional validity of their actions and/or personal financial loss. (Author)

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THE PERSONAL LIABILITY OF COMMUNITY COLLEGE OFFICIALS

by

Deborah Crandall

Topical Paper No. 61

April 1977

ERIC Clearinghouse for Junior Colleges
University of California
Los Angeles 90024

U S DEPARTMENT OF HEALTH,
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PREFACE

The personal liability of community college administrators and trustees hinges on the interpretation of a particular federal statute, 42 U.S.C. Section 1983. Although it is not a jurisdictional statute, Section 1983 cases are almost always brought in the federal courts. The decisions of the United States Supreme Court are, of course, binding on all federal courts; however, the decisions of one Circuit Court are binding only on the District Courts within that Circuit. Because of the nationwide scope of this paper, decisions from all Circuits have been reviewed and discussed. For those unfamiliar with their Circuits, the following list is provided:

D.C. Circuit--District of Columbia only.

First Circuit--Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico.

Second Circuit--Vermont, Connecticut, and New York.

Third Circuit--Pennsylvania, New Jersey, Delaware, and the Virgin Islands.

Fourth Circuit--Maryland, West Virginia, Virginia, North Carolina, and South Carolina.

Fifth Circuit--Florida, Georgia, Louisiana, Alabama, Mississippi, Texas, and the Canal Zone.

Sixth Circuit--Ohio, Kentucky, Michigan, and Tennessee.

Seventh Circuit--Wisconsin, Illinois, and Indiana.

Eighth Circuit--North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri, and Arkansas.

Ninth Circuit--California, Nevada, Arizona, Oregon, Washington, Idaho, Montana, Hawaii, Alaska, and Guam.

Tenth Circuit--Wyoming, Utah, Colorado, Kansas, Oklahoma, and New Mexico.

I would like to thank Dr. John Lombardi, Research Educationist at the ERIC Clearinghouse for Junior Colleges, for conceiving of this project and for his invaluable criticism and guidance of its progress. Without his constant assistance, this paper would be a hopeless maze of legal jargon and footnotes. I would also like to acknowledge the

assistance of the UCLA Community College Leadership Program and the many community college presidents who responded to our request for information.

Deborah Crandall
ERIC Clearinghouse for
Junior Colleges
April 1977.

A NOTE ON JUDICIAL CITATION

All citations to court cases are complete in the text and footnotes. For those unfamiliar with judicial citations, a gloss on those citations follows:

408 U.S. 308 (1975) indicates a United States Supreme Court decision which was rendered in 1975 and can be found in volume 408 of the United States Reports beginning at page 308.

519 F.2d 273 (5th Cir. 1975) indicates a decision rendered in 1975 by the Circuit Court for the Fifth Circuit which can be found in volume 519 of the Federal Reporter, 2d Series, beginning at page 273.

394 F. Supp. 853 (S.D. N.Y. 1975) indicates a decision rendered in 1975 by the District Court for the Southern District of New York which can be found in volume 394 of the Federal Supplement beginning at page 853.

The District Courts are the trial courts of the federal system. The Circuit Courts are the appellate courts of that system. While all decisions of the latter are published, only selected decisions of the former are published; thus, a case often reaches the appellate level with no published trial court opinion for the researcher to review.

Decisions of the state courts are published in various reporters too numerous to list here. They are also listed in the National Reporter System, which includes seven regional reporters--Atlantic (A), Pacific (P), North Eastern (N.E.), South Eastern (S.E.), North Western (N.W.), South Western (S.W.), and Southern (S)--and in two separate reporters provided for the two most litigous states--New York Supplement (N.Y.S.) and California Reporter (Cal. Rptr.). The regional reporters publish decisions of state appellate courts; the two state reporters publish selected decisions of the lower court decisions as well.

The citations for state court decisions are similar to those

for federal court decisions. Thus, 22 N.Y.S. 557 (1966) indicates a New York state court decision which was rendered in 1966 and can be found in volume 22 of the New York Supplement beginning at page 557.

If a direct quotation is used, the page is indicated by the number following the beginning page number of the case. Thus, 420 U.S. 308, 310 (1975) indicates a quotation found on page 310 of the case beginning at page 308 of volume 420 of the United States Reports.

INTRODUCTION

On June 28, 1974, three days before she would have attained tenure, Patricia H. Endress, instructor of journalism and advisor to the student newspaper at Brookdale Community College (New Jersey), was fired. She had written an editorial in the student newspaper accusing W. Preston Corderman, the President of the Board of Trustees, of a conflict of interest in that Brookdale had contracted to purchase audio-visual equipment from a company of which he was director and officer and of which his nephew was president. An article on the same subject, written by a paraprofessional employed by the college, had appeared in the same issue of the student paper. Upon the recommendation of the college president, Donald H. Smith, the Board of Trustees passed a resolution at a public meeting of the Board terminating Ms. Endress' employment for cause and rescinding the contract she had signed for 1974-75.

According to President Smith, Ms. Endress had violated the tradition of Board policy and the philosophical platform and goals of the college as the same pertain to freedom of the press and student responsibility for the college newspaper. He alleged that by ordering the student editor to publish certain material without his approval, she had (1) violated the editorial prerogatives of the student editor and student staff and her duties as a teacher of journalism and as advisor to the student newspaper, (2) subverted the function of the editor and her obligation to properly train and advise in accordance with the accepted standards of journalism, and (3) caused the student newspaper to publish libelous matter contrary to accepted journalistic standards.

Ms. Endress brought suit in the Superior Court of New Jersey against the college, the college President, the chairman of the board of trustees, and the eight other members of the board. The court found that she had not caused the article and/or editorial to be published over the objections of anyone on the newspaper staff, that the article and editorial were not libelous, and that her employment had been terminated

for constitutionally impermissible reasons and not for "cause."

Because her contract could be rescinded only for "cause," the court found the college in breach of contract and ordered the college to reinstate her with an employment contract for 1975-76 at the same level as if she had worked in 1974-75; to pay her full salary for 1974-75, less the amount she had earned that year as a secretary in her child's nursery school ($19,121, less $5,000 = $14,121); and to pay to the appropriate agencies all pension and/or retirement contributions it would have paid for her benefit if she had been employed during 1974-1975 at an annual salary of $19,121.

If the Superior Court had stopped here, this would be just another reinstatement case.[1] However, the court went on to assess damages against the individual defendants who had voted for the termination of her employment. For violating her First and Fourteenth Amendment rights, those seven defendants were ordered to pay her $70,000 in compensatory damages and $70,000 in punitive damages ($10,000 each). They were also ordered to pay her attorney's fees in the amount of $10,000 and the costs of her suit against them.[2]

The Brookdale case, and others like it, is beginning to cause great concern among community college administrators and trustees.[3] Like doctors and police officers, school administrators and trustees at all levels are becoming increasingly liable for their actions. Because of this phenomenon, the ERIC Clearinghouse for Junior Colleges began to analyze the issue of the personal liability of community college administrators and trustees.

The purpose of this report is to inform community college officials of their potential liabilities. It is not meant to be a legal document and we pretend no ability to instruct community college leaders on methods of avoiding such suits. Our intent is simply to illustrate the kinds of actions taking place in the courts and to provide useful background information on personal liability.

We should mention at the outset that the number of these cases is quite small. With the assistance of the UCLA Community College

Leadership Program, the ERIC Clearinghouse for Junior Colleges recently asked 93 community college presidents to tell us of any such cases brought against individuals at their colleges. Of the 31 respondents, 23 reported no such cases. Of those cases reported, only two involved suits for damages brought against the community college officials in their individual capacities (several others were suits for injunctions, reinstatements, etc.).

At Citrus College (California), veterans are bringing suit against the college and several of its officials for allegedly violating their civil rights, for breach of contract, and for breach of fiduciary duty, misrepresentation, and negligence. Evidently, the college had recruited veterans and had promised them that they would receive educational assistance benefits if they just followed the advice of the college administrators as to what courses to take and if they made "normal progress." After an audit of college records by the V.A. which uncovered serious bookkeeping errors, however, the plaintiffs' benefits were terminated.

The suit is being brought as a class action by eleven named plaintiffs on behalf of themselves and approximately 1,000 other students at Citrus College. They are asking for actual damages, general damages in the amount of $5,000,000, punitive damages in the amount of $5,000,000, attorney's fees, and court costs.

The second suit, also a class action, involves Contra Costa Community College (California). The suit is being brought by various Chicano groups against the Board of Governors of the California Community Colleges, the Chancellor of the California Community Colleges, the Dean of Student Affairs for the California Community Colleges, the Governing Board of Contra Costa, and ten Contra Costa officials. The plaintiffs claim that the defendants have deprived them of equal employment opportunities and nondiscriminatory educational programs in violation of Title VII and the First, Thirteenth, and Fourteenth Amendments.

Our review of cases published in official court reporters also

turned up only a handful of cases involving the personal liability of community college administrators or trustees. We suspect that more have been settled out of court but the evidence seems to show that, at present, few administrators or trustees at the community college level have felt the sting of an adverse court judgment. This is not to say that their luck will always be this good. The concept of this kind of liability is relatively recent, and the rules of the game have just been changed.

One thing that all these cases have in common is 42 U.S.C. Section 1983.[4] This is a federal statute which provides a remedy of money damages to any person whose constitutional rights have been violated by another person, if that other person was acting "under color of state law." Because the courts have concluded that a school district or board is not such a "person,"[5] and because suit against an individual college officer in his official capacity is equivalent to a suit against the district or board itself, these suits must be brought against the officer in his individual capacity.

This report is divided into four sections. The first section explores the factors which motivate plaintiffs to bring such suits. The second section discusses the statute and the doctrine of official immunity as it applies to suits brought pursuant to it. The third section analyzes the new standard of official immunity for public school officials sued under Section 1983 and its implications for community college officials. The final section reviews some related issues, such as how this effects private junior colleges, who pays the attorneys, and the possibilities of insurance.

SECTION I

WHY SUE THE OFFICIAL IN HIS INDIVIDUAL CAPACITY?

Given a choice, most plaintiffs would probably rather sue a school board or district than an individual school official. The board or district is much more likely to have the money to satisfy

the judgment. Furthermore, because the district or board is likely to have insurance or indemnity, judges and juries are more likely to favor the plaintiff if they are sued.

Nevertheless, at least two factors have foreclosed the possibility of suing a public school board or district and have forced aggrieved plaintiffs to seek their remedies against the officials as individuals. One of these factors is the Eleventh Amendment. The other is the common law doctrine of official immunity.

The Eleventh Amendment

The Eleventh Amendment, in recognition of the importance of state sovereignty, forbids a federal court from entertaining a suit brought against a state by citizens or another state. The full text of this amendment is as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or subjects of any Foreign State.[6]

Although, on its face, it appears only to bar such suits in federal courts, it has been held to bar them in state courts as well.[7] Also, even though it does not provide immunity for a state from suits brought in federal courts by its own citizens, the United States Supreme Court has repeatedly found such immunity in the amendment by implication.[8]

Thus, if a suit is brought against a state, it must be dismissed on the basis of the Eleventh Amendment unless the state has evidenced an intention to waive its immunity from the particular kind of suit involved.[9] This is true whether the state is named as the defendant or not. If the state is the real party in interest, i.e., if the damage award will come from the state treasury, the suit is barred,[10] even if the named defendant is, for instance, the Governor of the state, a community college board of trustees, or a college official sued in his official capacity.

Somewhat oddly, given the Amendment's clear language, the Supreme Court has held that it does not bar Section 1983 suits brought against a state officer in his official capacity if the plaintiff seeks only prospective equitable relief.[11] This allows an aggrieved plaintiff to obtain the remedy of reinstatement from the board/district itself. Thus, if the plaintiff seeks only that remedy, he need not sue board members, administrators, etc. as individuals. However most plaintiffs want more than that--they want money damages for the illegal actions of the officials who wronged them--and, Section 1983 entitles them to this remedy, as well as to reinstatement. But it is this that the Eleventh Amendment prohibits them from recovering from either the board/district itself or from the administrators/trustees in their official capacities, if the board/district can be characterized as a state entity. As a result, most plaintiffs bring suit against both the board/district and the particular individual(s) who allegedly wronged them. This is exactly what Ms. Endress did, and she was allowed to recover against both; she got equitable relief from Brookdale College and money damages from the board members as individuals.[12]

Of course, it is possible that the board/district is not a state entity. If it is not, the Eleventh Amendment provides no bar to prevent the plaintiff from seeking any remedy against the board/district as such. The determination of whether or not a suit against a public community college district, board of trustees, or official is a suit against the state is a matter of state law. The deciding factor in such determinations is whether the district/board is a distinct political entity and its officials are "local" government officials, or whether it is considered an "alter ego" of the state and its officials are "state" government officials.[13]

In making these decisions, the courts look to various factors, the most important of which is whether, in the event plaintiff prevails, judgment will have to be paid from the state treasury. In the case of a government agency, such as a public school district or

board, they will also consider whether it is separately incorporated, whether it has the power to sue and be sued and to enter into contracts, the degree of autonomy over its operations, and whether the state has immunized itself from responsibility for the agency's operations.[14] These same considerations will be looked to if it is a public school official being sued in his official capacity.

If the court concludes that the community college district or board is a distinct political entity and its officers are "local" government officials, the aggrieved plaintiff may sue either one directly.[15] On the other hand, if the "alter ego" and "state" government official status is found, the case will be dismissed unless the State has clearly and specifically waived its immunity from such suits.

Because so many public schools and colleges are considered "alter egos" of the state, the aggrieved plaintiff has been forced to sue its officials as individuals to obtain any redress other than prospective equitable relief. But, if the action upon which liability is to be based was taken by the "state" official in his official capacity, i.e., in the course and scope of his employment, how can he become an "individual" for purposes of suit?

The answer to this question is rather unsatisfactory. Apparently, this can occur only if the state official has violated the plaintiff's federal constitutional rights. In order to open an avenue of relief for persons deprived of their federal constitutional rights by state officers, the courts have adopted a legal fiction which leads to a finding that when a state officer has violated the United States Constitution, he is no longer to be considered a state officer for purposes of suit. The theory is that the United States Constitution is the highest law of the land and that, when a state officer acts in violation of it, he is stripped of his official or representative character and is subjected <u>in his person</u> to the consequences of his official conduct.[16]

The Doctrine of Official Immunity

Assuming that the court finds that the community college board/district is a "local" entity and, therefore, that the plaintiff's suit against it or its officers in their official capacities is not barred by the Eleventh Amendment, the court must still consider whether or not that suit is barred by the doctrine of official immunity. This judicially created rule protects public officials from suits based on actions taken during the scope of their official duties whether they are considered "local" or "state" officers for purposes of Eleventh Amendment analysis.

The doctrine was designed by the courts to shield public officials from liability for any torts they might commit while performing their public functions. Originally, it barred all suits against public officials as long as the action on which liability was sought to be based had been taken in the course and scope of their official duties.[17] It was derived from the medieval concepts that "the King can do no wrong" and that the courts had no power to enforce a judgment against the King.

Its acceptance by the American colonies, of course, was for different policy reasons. Chief among those reasons were the following: (1) to assure that public officials remain "free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties--suits which would consume time and energies which would otherwise be devoted to governmental service...,"[18] (2) "to protect the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities,"[19] (3) to avoid "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required by the legal obligations of his position, to exercise discretion,"[20] and (4) to forestall "the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness

and the judgment required by the public good...."[21]

Although this doctrine was, at first, adopted wholesale in the United States, the various courts later began to take varying stances on the issue. Some courts retained the absolute immunity standard for all such officials; others retained the absolute immunity standard for discretionary acts (deciding to do something in a certain way), but did away with it for ministerial acts (actually driving the children to school, actually repairing the stadium bleachers, etc.); still others allowed it as an absolute defense if the official could show that he committed the act in question in "good faith;" and still others did not allow the immunity at all in certain suits.

In any event, because the scope of official immunity accorded to state officials in most states is extremely wide, it appears that disgruntled plaintiffs began to look for federal remedies. And they finally found one that worked--42 U.S.C. Section 1983. During the past decade, this statute has gained increasing significance.[22] Its rise has paralleled the increased recognition of the constitutional rights of students and teachers. The fact that it provides a remedy against state officers as <u>individuals</u> eliminates Eleventh Amendment concerns.[23] However, most courts have allowed some form of official immunity even in these suits.

The immunity accorded to a state official for violation of Section 1983 is likely to vary from that accorded to the same official for violation of a state law. Thus, although the community college official might be immune from a suit based on state law, he might not be immune from one based on Section 1983, even if the allegedly wrongful action, i.e., deciding not to renew the contract of a non-tenured employee, is identical. This is not because Section 1983 suits are usually brought in federal courts, while suits for violation of state law are usually brought in state courts, but because the policies underlying Section 1983 have made it necessary for the courts to develop a federal immunity standard specifically tailored to this statute.

Because the policies of Section 1983 are important to the development of the new standard of immunity for community college officials who find themselves as defendants in Section 1983 suits, they must be understood before the new standard can be profitably discussed.

SECTION II
THE FEDERAL STATUTE THAT ALLOWS SUCH SUITS AND THE IMMUNITY STANDARD BEFORE WOOD v. STRICKLAND

42 U.S.C. Section 1983

This statute, known as the Civil Rights Acts of 1871, provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable in an action of law, suit in equity, or other proper proceedings for redress.[24]

It was passed by the Reconstruction Congress to assure that no state officer would continue to deprive a black of his constitutional rights without paying for it.[25] It was enacted as section 1 of the Ku Klux Klan Act of April 20, 1871[26] and was designed to remedy the intolerable conditions in the South following the Civil War. Despite its specific purpose, Section 1983 was cast in broad and general language to provide a cause of action for every person (black or white) who was deprived of a constitutional right by a state official. Nevertheless, the statute was seldom used until the late 1960's and early 1970's[27] when it proved to be a useful weapon against state officials of all kinds for every sort of constitutional violation.

It is this statute which is causing the most trouble for public community college officials. It provides a federal remedy of damages for those deprived of their constitutional rights by any "person" who acts "under color of any statute, ordinance, regulation, custom, or usage, of any State." Thus, if the "person" acted with the actual or apparent authority of the state when he took the questioned action, he can be sued under this statute.[28]

Since all public community colleges act with the actual or apparent authority of the state, all their officers are potential defendants in Section 1983 suits. Furthermore, they must be sued in their individual capacities since it has been determined that school boards/districts are not "persons" for purposes of this statute[29] and that a suit against an official in his official capacity is a suit against the board/district.

Whether the plaintiff can recover or not depends not only on whether his constitutional rights have been violated by the person he sues, but also on the scope of immunity accorded to the defendant by the court. A discussion of the immunity accorded to Section 1983 defendants follows.

Official Immunity Under Section 1983

In the context of Section 1983 actions, the exact scope of official immunity has been a much contested issue. Section 1983 imposes liability for money damages on any "person" who deprives another of his/her constitutional rights. However, the "person" sued must have taken the questioned action "under color of state law," which means that he must have been acting as an agent of the state possessing the state's authority, and state officials are usually immune from suit under the doctrine of official immunity. Obviously, the statute is meaningless if the officer has absolute immunity from civil rights suits, since all those sued under it must be state officials or their agents in the first place.

Given the purposes of Section 1983, it seems evident that the

Congress which enacted it did not contemplate the defense of official immunity in Section 1983 actions.[30] Nevertheless, most judges, when confronted with Section 1983, which provides for suits against public officials, drew on their knowledge of the policies underlying official immunity and held that those same policies barred Section 1983 suits also.

Because it is a federal statute, the federal common law of immunity should govern.[31] However, until quite recently the Supreme Court had not given the lower federal courts much guidance in this area and, forced to come to their own conclusions, these courts adopted varying standards.[32] Although these standards were often similar to those that the official's state courts had adopted for tort actions, they were at times significantly different.

Prior to 1975 the Supreme Court had decided only four cases involving this issue. In those cases, it determined that judges[33] and state legislators[34] are to be accorded absolute immunity from Section 1983 suits, that police officers sued for false arrest are to be accorded immunity if they acted in good faith and with probable cause to believe that the plaintiff was to be arrested,[35] and that other kinds of officials were to be accorded varying kinds of immunity depending on the scope of their authority.[36] Since community college officials fall into the last category, the Supreme Court can hardly be said to have established an immunity standard for them.

The federal courts of appeal came to widely different conclusions on this issue. Although several concluded that public school officials were entitled to immunity for all "good faith" actions taken in the course of their official duties, the definitions of "good faith" varied. The Circuit Courts for the D.C. Circuit,[37] and for the First,[38] Sixth,[39] Ninth,[40] and Tenth[41] Circuits defined the term in a totally subjective manner. Thus, if the school official subjectively thought he was doing the correct thing, he would not be held liable under Section 1983. The Circuit Court for the Second Circuit,[42] however, defined "good faith" in an objective manner. Under this standard,

the school official's actions could be characterized as being taken in good faith only if they were reasonable, i.e., if a reasonable man would have agreed that this was the correct action to be taken at the time. The definition adopted by the Seventh Circuit[43] was by far the stiffest as far as the public school official is concerned. It held that school officials' actions were in good faith only if their actions were justifiable, i.e., only if they did not deprive someone of a constitutional right.

Other Circuits did not apply the "good faith" standard. The Circuit Court for the Third Circuit, for instance, allowed absolute immunity to all public officials who performed discretionary acts.[44] Since deciding to dismiss a student, discharge a teacher, etc., is a discretionary act, there would be no liability for such an action, whether it was taken in "good faith" or not.

The standard adopted by the Fifth Circuit was one of absolute immunity as long as the official was acting within the scope of his employment when he took the action involved.[45] In direct contrast to this is the standard adopted by the Eighth Circuit, which was one of no immunity for anyone sued under Section 1983.[46]

Then came the 1975 United States Supreme Court decision of Wood v. Strickland,[47] where the Court seems to have resolved all this as far as public school officials are concerned. There, the Court held that members of a high school board of education are entitled to immunity if (1) they acted in good faith and (2) if they did not know and reasonably should not have known that they were violating the constitutional rights of another. The case involved an alleged deprivation of the constitutional rights of students, and the Court explicitly limited its holding to the "specific context of school discipline." Nevertheless, the case apparently stands for a broader principle and undoubtedly will be applied to community college officials in suits brought by employees, as well as students.

In another major 1975 decision the Court held that the Wood standard should apply to state hospital officials sued by a patient

for deprivation of liberty.[48] Furthermore, the Court has subsequently remanded for consideration under Wood a case involving state college officials (members of the board of trustees and the president) and the Superintendent of Education for the Commonwealth of Pennsylvania.[49] This latter case involved a nontenured teacher's claim that his constitutional rights had been violated by the defendants' refusal to renew his contract.

Also, the lower courts have already applied this standard to community college officials. In the Endress case,[50] described in the introduction to this paper, the Wood standard was applied to members of a community college board of trustees and to the college president in the context of teacher dismissal. In Hostrop v. Board of Junior College District No. 515,[51] it was applied to members of a community college board of trustees in the context of dismissing its president. In Hanshaw v. Delaware Technical and Community College,[52] it was applied to members of a community college board of trustees in the context of discriminatory hiring policies. Finally, in Phillips v. Puryear,[53] it was applied to a community college president, its deans and professors, and to the Chancellor of the State Community College System of Virginia. This standard has also been applied to four-year college officials in a variety of contexts.[54]

The Wood decision and the standard it establishes is discussed in detail in the following section.

SECTION III
THE NEW STANDARD OF IMMUNITY IN SECTION 1983 SUITS

Wood v. Strickland

Wood involved three female students in a high school in Arkansas who had "spiked" a punch bowl containing punch to be served on the school grounds at an extra-curricular function. The girls were 16 and in the 10th grade. As a result of their action, the school board suspended them for about three months on the basis of a school

regulation prohibiting the use or possession of intoxicating beverages at school or school activities.

The girls sued the school board members under Section 1983, claiming that their federal constitutional right(s) to due process had been violated. The trial court held that, even if their constitutional rights had been violated, their suit was barred since school board members are immune from suit unless plaintiffs could prove that defendants acted with malice, in the sense of ill will, toward the students; accordingly, it dismissed the case.[55]

On appeal the case was reversed and remanded (sent back to the trial court for reconsideration).[56] The appeals court decided that school board members are immune from suit only if they pass an objective test of "good faith," that the students' rights to due process had been violated, and that they were entitled to injunctive relief and a new trial on the questions of "good faith" and damages.

The reason for its decision, however, was not the procedural due process rights to notice and a hearing. Instead, it was their "substantive" due process rights that the court found had been violated. This means, in brief, that the basis on which the board's decision was made was unconstitutional. The court found that the board had made its decision to expel the girls without considering <u>any</u> evidence that the students possessed or used an <u>intoxicating</u> beverage at a school-sponsored activity. According to the judge, the meaning of the word "intoxicating" was to be established by the definition of that word in the state statutes, which said that an "intoxicating" beverage had to have an alcoholic content exceeding 5% by weight. On this theory, he found that board's failure to consider evidence to establish the alcoholic content of the beverage the girls brought to school was a serious error. It was on this basis that the appellate court reversed the trial court's dismissal of the case and sent the case back to the trial court for further proceedings.

Before the case reached the trial court again, however, it was appealed to the Supreme Court of the United States which decided to

hear the case. On the issue of substantive due process, this court held that there had been no violation.[57] It said that school regulations were to be interpreted by the board, which had adopted them, and not by the courts. Thus, unless the school regulation said that it incorporated the state definition of "intoxicating," it was not for the courts to say that it did. The board knew that the beverage put into the punch bowl was malt liquor and that such a beverage contains alcohol. Since the school regulation evidently defined "intoxicating" as containing any alcohol, the board had sufficient evidence before it to decide that the girls had violated that regulation, especially since the girls had admitted that they intended to spike the punch and that they had mixed the liquor into the punch that was served.

Having disposed of the substantive due process issue, the Supreme Court then turned to the issue of official immunity. This is the part of the decision that has great importance for public community college officials. In deciding the issue, the court considered the doctrine of official immunity at great length.[58] It considered the pros and cons of establishing different standards of immunity for public school officials. Among its considerations were the following: (1) the common law and most state laws currently protect such officials from tort liability for all good faith, non-malicious action taken to fulfill their official duties; (2) such officials have difficult decisions to make and should not be held liable for every mistake which leads to a violation of someone's constitutional rights since, if they were, the officials would be deterred from exercising their judgment "independently, forcefully, and in a manner best serving the long-term interest of the school and the students;" (3) the most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure; (4) absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise

their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations; (5) there must be a degree of immunity if the work of the schools is to go forward--"and, however worded, the immunity must be such that public school officials understand that action taken in good faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity."[59]

The Court found that the correct standard of conduct should be based not only on permissible intentions, but also on "knowledge of the basic, unquestioned constitutional rights of his charges."[60]

The Wood standard is two-pronged. A school board member is immune from suit only (1) if he acted in good faith and (2) if he did not know and should not have known that he was violating the constitutional rights of another. The first prong of this test is entirely subjective; it requires the court to consider the official's state of mind at the time he took the questioned action. The second prong contains both subjective and objective elements. If the official actually knew that he was violating the plaintiff's constitutional right(s), he is liable. However, he is also liable if he should have known that he was violating a constitutional right, and the courts will conclude that he should have known about this if the right was "undisputed."

There is no indication in the opinion of what makes a constitutional right "undisputed."[61] However, it is certain that whatever the United States Supreme Court has decided is a constitutional right is an "undisputed" right. An example of an undisputed constitutional right is the right of non-tenured public school teachers to due process before deprived of a property or liberty interest.

The Court recognized this right in 1972 in the companion cases of Board of Regents of State Colleges v. Roth[62] and Perry v. Sindermann,[63] where it held that non-tenured public school teachers must be given notice of the charges against them and a hearing before an impartial

decision-maker before the non-renewal of their contracts in certain circumstances. If the teacher can show that the decision not to renew his contract somehow deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, the Fourteenth Amendment guarantees that he will have a hearing prior to the board's decision of non-renewal.

If the board makes charges against the teacher that might seriously damage his standing and associations in his community or that otherwise impugn his good name, reputation, honor, or integrity, or that impose on him a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities, the teacher has a "liberty" interest which cannot be taken from him without due process, which includes a notice of the charges against him and a chance to refute those charges at a hearing.[64]

A "property" interest will be found if the teacher has tenure,[65] or if he has a contract for a certain term.[66] In fact, it will be found whenever the teacher had a "reasonable expectancy of continued employment."[67] A teacher will be considered to have had a "reasonable expectancy of continued employment" whenever he legitimately relied on board rules or mutually explicit understandings to the effect that his employment would not end when it did. Thus, in the Perry case, the Court held that, if his allegations could be proven, Sindermann, a non-tenured teacher at Odessa Junior College, had a "property" interest[68] and was entitled to a hearing before the non-renewal of his contract. The college's Faculty Guide indicated that the college had a de facto tenure policy and the guidelines promulgated by the Coordinating Board of the Texas College and University System provided that a person who had been employed in that system for seven years or more had some form of job tenure. The finding of a de facto tenure policy was based on a provision in the Faculty Guide to the effect that faculty members would remain employed as long as their teaching services were satisfactory and they displayed a cooperative attitude toward their co-workers and superiors. Thus, the decision not to

renew Sindermann's contract without giving him notice and a hearing was in violation of the Fourteenth Amendment, which provides that no state shall deprive any person of property without due process of law.

After Roth and Sindermann, public school teachers have an undisputed constitutional right to due process before their contracts are terminated or non-renewed if legitimate property or liberty interests are at stake. Therefore, if such a teacher is deprived of one (or both) of these rights without due process of law, he is entitled to relief under Section 1983 against all those who deprived him of it. After Wood, the defendants will be entitled to immunity only if they acted in good faith and if they did not know and could not have known that they were violating his constitutional rights.

It is important to note that the Wood decision does not charge public school officials with "predicting the future course of constitutional law."[69] Thus, if the particular right involved was not undisputed at the time the official action was taken, there can be no liability even if that right became undisputed before the trial took place. For instance, if a non-tenured public school teacher's contract was not renewed in 1971, the board members cannot be held liable for depriving him of liberty or property interests without due process of law, since his right to due process did not become "undisputed" until the Roth and Sindermann decisions in 1972. And, they will have no liability even if the final resolution of the case occurs after 1972, when the court deciding the case has the benefit of the Roth and Sindermann opinions.[70] They will only be liable for violating rights that were undisputed at the time their action was taken.

Is the Wood Standard Fair?

1. The Dissenting Opinion.

The Wood decision was far from unanimous; of the nine Supreme Court Justices, four thought it was wrong.[71] The dissenting Justices claimed that the majority opinion imposed a higher standard of care

upon public school officials than that previously required of any other official:

> It would impose personal liability on a school official who had acted sincerely and in the utmost good faith, but who was found--after the fact--to have acted in 'ignorance...of settled, indisputable law.' ...Moreover, ignorance of the law is explicitly equated with 'actual malice.' ...The Court's decision appears to rest on an unwarranted assumption as to what lay school officials know or can know about the law and constitutional rights.[72]

They went on to say that constitutional law is constantly evolving and changing so that it is impossible even for constitutional law scholars to identify areas of "settled, indisputable law" or "unquestioned constitutional rights." In their opinion, the "good faith" standard so recently established in Scheuer v. Rhodes,[73] the suit brought against the Governor of Ohio and the President of Kent State University by the parents of the three students killed by national guardsmen in the Kent State incident, was the appropriate standard to be applied to public school officials. In Scheuer, the Supreme Court held that state executive officers were immune from Section 1983 suits if, in light of the discretion and responsibilities of their offices, and under all of the circumstances as they appeared at the time, the officers had acted reasonably and in good faith.

Despite this criticism, the Wood standard has proven to be beneficial for public school officials. In fact, exactly because there are so few areas of "settled, indisputed law" and so few "unquestioned constitutional rights," this standard has shielded school officials from liability more often than it has imposed it.

For instance, in Hostrop v. Board of Junior College District No. 515,[74] the Wood standard protected community college officials from liability under Section 1983.

2. The Hostrop Case.

In this case, the president and chief administrative officer of Prairie State College, a public two-year college in Illinois, brought suit against the college board and the board members for alleged wrongful termination of his employment. The case has recently ended, having been through two trial courts, two appellate courts, and two appeals to the United States Supreme Court, the United States Supreme Court refusing to consider either appeal.

Mr. Hostrop claimed that he was fired because of an administrative staff memorandum which he had circulated to staff members on May 25, 1970. The memo proposed certain changes in the Ethnic Studies Program at Prairie State. It asked the staff members to consider the proposed changes for discussion at the next staff meeting. Hostrop intended the memo to be confidential, but somehow it became public (it was leaked to a newspaper), at which time several members of the board questioned Hostrop's right to make such proposals and told him it was not a matter of free expression, that he had breached his administrative duties in circulating the memo.

Hostrop was discharged on July 23, 1970 without a prior notice of the charges against him and having been given no opportunity to be heard. He was later given a statement of the charges against him; this statement merely alluded to the memo as a reason for his discharge.

The first trial court dismissed the case for failure to state a claim upon which relief could be granted.[75] It based its decision on the defendant's contentions that the case was governed by certain language in Pickering v. Board of Education.[76] In that case the United States Supreme Court had held that the First Amendment guarantee of freedom of speech is not absolute and that school boards could properly restrict an employee's freedom of speech if it could show that such restrictions were necessary to maintain discipline, to promote harmony among co-workers, or to promote the efficiency of the public services the board performs. In Pickering, the Court established what has been called the "working relationship test." This allows

a school board to discharge an employee if his relationship with the Board and the administration is the kind of close working relationship for which it can persuasively be claimed that personal loyalty and confidence are necessary and if the board believes it has lost either.

Finding that the president of the college had such a "working relationship," the first trial court held that Hostrop's freedom of speech could legitimately be restricted and that his employment could be terminated whenever the Board had lost confidence in him or believed that it had lost his personal loyalty. It also held that he had no constitutional right to a hearing since his expectancy of employment was unreasonable in light of his relationship to the board and that he had no right to a statement of charges against him since the need of the Board to have wide discretion in deciding to discharge its presidents without asserting reasons outweighed the president's need to know the reasons for his dismissal, as well as any harm to his professional career.

On the first appeal,[77] the Circuit Court of Appeals for the Seventh Circuit reversed. It held that even if Pickering applied to the relationship between Hostrop and the Board, the memorandum, on its face, was not a serious impairment of the working relationship. It found that Hostrop was simply seeking to contribute to the discussion of a curriculum issue that would be decided by vote of the Board and that, unless his distribution of the memo could be proven to be evidence of insubordination, there was no ground for discharge.

Having thus found that Hostrop had stated a valid claim under the First Amendment, which guarantees the right of free speech, the appeals court went on to hold that he had stated a valid claim under the Fourteenth Amendment as well. He had a property interest since he had a contract which did not expire until 1972 and he had a liberty interest because his standing in the community had been damaged by the board's allegations that he had supplied them with false information and had withheld other important information. Under the Fourteenth Amendment, as interpreted by the Supreme Court in Roth and Sindermann,

neither of these interests could be arbitrarily taken away from him;[78] thus, he was entitled to notice of the charges against him, notice of the evidence upon which the charges were based, a hearing before a tribunal possessing apparent impartiality, and a chance to present witnesses and confront evidence at the hearing. This court remanded the case to the trial court for reconsideration. Before the case was again heard in the trial court, the board appealed to the United States Supreme Court, which declined to consider the case.

On remand,[79] the trial court again found for the defendant board members. It held that Hostrop had no valid Fourteenth Amendment claim. In its view, Hostrop himself, had made public the board's reasons for his discharge and the board had no intention of so doing; thus, if he had been deprived of liberty, it was his fault, not that of the board. It also found that Hostrop had no legitimate property interest in that he had "deceptively deleted a material provision of his proposed employment contract and had misled the board concerning his extensive outside involvements," and therefore the contract was void. It also found that even if Hostrop had a right to a hearing, he had waived it by failing to attend the meeting at which he was discharged.

As far as the First Amendment claim was concerned, this court now found that the memo was only one reason for the board's decision to terminate Hostrop's employment, and that the other reasons--a series of confrontations and incidents resulting in a rough working relationship--warranted his dismissal.

Hostrop appealed the case again.[80] This time he won, sort of. The Circuit Court found that the trial court's findings on the First Amendment claim were justified. It specifically held, however, that even if Hostrop's exercise of his rights of free speech were only one reason for the dismissal, that dismissal would be unconstitutional. In agreeing that Hostrop's First Amendment rights had not been violated, this court found that the other reasons were the real reasons for his dismissal.

Nevertheless, it found that Hostrop's procedural due process rights had been violated by the defendant's failure to afford him a hearing. The court agreed with the trial court's determination that the board had deprived Hostrop of no liberty interests, but held that his contract of employment which did not expire until 1972 was at most voidable for fraud, not void. Therefore, Hostrop did indeed have a legitimate property interest which could not be taken away from him without a hearing. It also found that Hostrop had not waived his right to a hearing since the "hearing" that was offered to him was to be before the board which had already decided to terminate him and which had in fact, already made a commitment to hire another person as interim president. Since the board was no longer a tribunal possessing apparent impartiality,[81] Hostrop did not waive his right to a hearing by absenting himself from that meeting.

In determining whether or not Hostrop was entitled to money damages from the defendants individually, the court applied the official immunity test developed in Wood v. Strickland. It found that the defendants had not acted with any malicious intent to violate Hostrop's constitutional rights, but had acted sincerely in the belief that they were doing the right thing. Applying the second prong of the Wood test, the court found that there was no way that the individual defendants could have known in 1970 that the Supreme Court would have decided as it did in the Roth and Sindermann cases.[82] Therefore, they were entitled to the defense of official immunity for their actions.

Obviously, if the Board of Trustees of Prairie State College had discharged Mr. Hostrop after the Roth and Sindermann[83] decisions had been rendered, or if the appeals court had found that they had discharged him for exercising his constitutionally protected rights of free speech, the board members would have been held individually liable, even under the Wood test. However, before the Wood decision was rendered, they probably would have been held liable for failing to give Hostrop notice and a hearing, whether they did it before or after Roth and Sindermann.

A case supporting the truth of this statement is Smith v. Losee.[84]

3. Smith v. Losee.

Smith sued the President, the Dean of Academic Affairs and the Dean of Applied Arts at Dixie Junior College (Utah) and the nine members of the Utah State Board of Education under Section 1983. Smith had been discharged from his position as an associate professor of history primarily because he had actively supported a Democratic candidate for state office who was unpopular with the college administration and the townspeople and because he had criticized the college administration. Under the Utah Board of Education's tenure policy, a probationary instructor, such as Smith, could be terminated at the will of the college president.

Of course, this policy is unconstitutional after Roth and Sindermann, which require that all public institutions give notice and a hearing to any employee who has reasonable expectancy of employment (a property interest) or whose chances of obtaining future employement will be materially damaged by the institution's actions (a liberty interest).[85] However, the Roth and Sindermann decisions were made in 1972, so there was no way for the Board members or for anyone else in 1969 to know that this tenure policy would prove unconstitutional.

The trial court imposed personal liability on all the defendants. The appellate court reversed as to members of the State Board of Education since they had acted wholly upon the President's recommendation and obviously had no actual malice against Smith and had acted in "good faith" on the facts before them.[86] It affirmed as to the three Dixie College officials, however, finding them liable to Smith in the total amount of $9,100 for violating his constitutional rights to notice and a hearing before discharge, as demanded by Roth and Sindermann, and for discharging him for exercising his First Amendment rights as defined in Pickering.[87] All three defendants were held liable for the costs incurred by Smith in moving after his discharge--a total of $4,100, presumably to be split three ways. In addition, the two defendants who had acted to punish Smith were ordered to pay him

$2,500 each as punitive damages.

Although the Pickering decision alone might have been sufficient to impose liability on the college officials, the court depended upon Roth and Sindermann also. It appears that, had the facts been slightly different and had the officials dismissed Smith for no reasons violative of the First Amendment, but simply without affording him an opportunity for a hearing, the court would have reached the same conclusion and liability would still have been imposed. After Wood, this could not have happened. Since the right of non-tenured school employees to notice and a hearing were not recognized until 1972, the Dixie College officials could not have been found liable for their failure to provide them in 1969.

4. The Shirley Case.

Another illustration of the fairness of the Wood standard of immunity is the case of Shirley v. Chagrin Falls Exempted Village Schools Board of Education.[88] Shirley involved a high school physical education instructor whose resignation was required as of the end of a semester prior to the end of the fifth month of her pregnancy. Board policy required all pregnant employees to resign at the end of the fifth month of pregnancy, or at the end of a semester, whichever occurred first. For Ms. Shirley, the "end of a semester" occurred approximately one month after she discovered her pregnancy. After unsuccessfully protesting application of the board policy to her, she brought suit against the members of the board of education as individuals. She alleged that the board policy discriminated against her as a female employee and deprived her of constitutional rights, privileges, and immunities.

At trial, the defendants raised the defenses of the Eleventh Amendment and official immunity, both of which were rejected. The court rejected their Eleventh Amendment claim because they were being sued in their individual capacities. The official immunity defense was denied because the defendants had not proven to the judge that there were reasonable grounds for believing that the "end of a semester"

provision of the pregnancy policy did not deprive Ms. Shirley of her constitutional rights.[89]

The district judge applied the "good faith plus reasonable grounds" test advocated by the dissent in Wood and found the board members individually liable to the plaintiff for violating her constitutional right to "liberty in the exercise of personal choice in matters of family life in conjunction with teaching,"[90] a right not recognized until 1974.[91] Ms. Shirley had been forced to resign in 1972.

On appeal,[92] the Circuit Court for the Sixth Circuit applied the Wood standard and found that the board members were entitled to the official immunity defense.[93] Since the right sought to be vindicated by Ms. Shirley was not "undisputed" until 1974, the defendants could not be held liable for violating it in 1972. To hold otherwise would be to charge them with "predicting the future course of constitutional law."

5. Conclusion.

In view of Hostrop, Smith, and Shirley, it appears that the Wood test of official immunity promises to impose no great burden on community college officials. It certainly requires them to know the constitutional rights of those with whom they deal and to act accordingly and in good faith, but it does not signal a great upsurge of personal liability.

In effect, the Wood test balances the rights of employees and students with those of administrators and trustees. Before Wood, the rights of the former varied with the jurisdiction, but generally were ignored in favor of the policies underlying the doctrine of official immunity.[94] After Wood, their rights are given some recognition. Since Section 1983, by its terms, provides for strict liability if constitutional violations can be proven,[95] the Wood test should be considered as a compromise position. It recognizes the rights of students and teachers and provides them with a remedy against those who violate those rights, but it is not a strict liability. Instead, community college officials will be held

liable in Section 1983 suits only if they violate known constitutional rights of those with whom they deal.

Knowing those rights should not prove too difficult. Cases like Endress v. Brookdale[96] and Smith v. Losee,[97] where liability was imposed, involved egregious and self-serving First Amendment violations. Consultations with an attorney before the unconstitutional actions were taken probably would have forewarned the community college officials of the risks they would incur if they decided to take those actions. Armed with such knowledge, it is highly unlikely that those officials would have acted as they did.

SECTION IV
SOME RELATED ISSUES

What About Private Junior College Officials?

The administrators and trustees of private colleges are shielded from liability under Section 1983 since their actions can seldom be characterized as having been taken "under color of state law." Several 1975 decisions have upheld the immunity of private school officials from suits under Section 1983, even though the schools receive state financial aid, benefit from the state's eminent domain power, and receive state scholarships and loan guarantees.

In Cohen v. Illinois Institute of Technology,[98] the Circuit Court for the Seventh Circuit held that a charge of sex discrimination in faculty appointment, retention, and compensation will not lie against officials at a private university unless the plaintiff alleges that the state supports or approves of the university's discriminatory conduct.

In Greenya v. George Washington University,[99] the Circuit Court for the D.C. Circuit held that a teacher who claims she was discharged for exercising her rights of free speech had no cause of action against officials at George Washington University because it is a private entity whose officials do not act "under color of state law."

In this case it was found that the university operated under a governmental charter, was exempt from federal and local taxation, received federal funding for several of its programs and capital expenditures, and that the teacher had been teaching government employees at a government facility.

The United States Supreme Court refused to hear appeals of either of these cases, indicating that it either approves of the decisions or wishes to wait for a more appropriate case in which to extend the "color of state law" language to private schools. It seems, however, that if any case comes close to being appropriate, it is the Greenya case. If no state action could be found in that case, the language of Section 1983 probably never will be extended and private community college officials may never be held liable for violating the civil rights of those with whom they deal.

Who Pays the Attorneys?

Since suits against public community college officials in their individual capacities are not suits against the board/district, it is likely that such defendants will have to use private attorneys to defend them in such suits. Therefore, if the plaintiff is suing the board/district, as such, under a breach of contract theory, for instance, and the officials as individuals in the same suit, it is common for the college officials to be represented in their official capacities by the board/district's attorney and in their individual capacities by their own attorneys. For instance, in Hanshaw v. Delaware Technical and Community College[100] and in Endress v. Brookdale,[101] the board and officials in their official capacities were represented by attorneys other than those representing the officials in their individual capacities.

Indeed, it was held in People ex. rel. Underhill v. Skinner,[102] that it would be against public policy to permit individuals to defend purely personal actions at the expense of the community. "Men undertake public duties--they discharge the duties of citizenship--subject to the risk to being called upon to defend their conduct in

the courts. It is one of the penalties we pay for the protection of society, and because the [defendants] have been called upon to make large disbursements in vindicating [their actions] is no reason why they should expect the school district to go outside of the law to reimburse them."[103] If they attempt to use the board attorney to defend their suits, the public community college administrators or board members could find themselves as defendants in a suit brought by local taxpayers.[104]

Ordinarily, each party to a lawsuit pays his own attorney's fees and court costs.[105] There are exceptions to this general rule, however. In certain circumstances, the courts may order the defendants to pay the plaintiff's attorney's fees as well as their own.

For instance, if the court finds that the defendant(s) acted "in bad faith, vexatiously, wantonly, or for oppressive reasons...," it may award attorney's fees to the plaintiff.[106] The reason for this exception is to deter the defendants from taking such actions in the future and to punish them for having taken the one in question.[107]

Another exception is made if the court feels that it is necessary to encourage plaintiffs to bring such suits. In Stolberg v. Members of Board of Trustees for State Colleges of Connecticut,[108] for instance, the Circuit Court for the Second Circuit held that the plaintiff was entitled to recover his attorney's fees so that other teachers with First Amendment claims would not be deterred from bringing such actions.

In view of the fact that Section 1983 cases often run through several appeals, attorney's fees are far from insignificant in this context. The Hostrop case,[109] for instance had to be argued in four different courts over a period of approximately five years before it was finally decided that the board members were not liable to the plaintiff. Although the board members did not have to pay Hostrop's attorney's fees, they presumably had to pay their own.

What About Insurance?

Blumer recommends that all colleges and universities either indemnify or insure their administrators and trustees.[110] He notes

that the extent to which college officials are indemnified "depends on the charter and bylaws of the particular institution, or the existence of a separate agreement between the official and the institution, and the laws of the relevant jurisdiction. The laws of the various states vary greatly on this point. Some preclude indemnification altogether, others will permit it if authorized by the articles or bylaws of the institution, and still others will permit it only for certain specified losses."[111]

Since indemnification provides only limited protection, it is often advisable for the college to purchase insurance as well. Such insurance should cover both administrators and board members for any loss incurred by reason of their exercise of their official duties. However, insurance, like indemnification, protects officials only from certain types of liability:

> It is feared that, by assuring a college or university official that he will never be forced to bear personal liability for any activity related to the institution, the official may lessen the standard of care with which he approaches his responsibilities. This would violate public policy and thus be illegal.[112]

The kinds of insurance coverage which can be purchased by any public community college will, therefore, vary with the state in which it is located. Some states will define their public policies to allow certain kinds of coverage that other states would forbid.

Even if the state permits such coverage, however, a court might find that it violates the United States Constitution. At least one judge has suggested, without explanation, that it would be unconstitutional, at least, if the college itself pays the premiums.[113] Presumably, the theory is that the purpose of Section 1983 is to assure that constitutional rights are not violated and, to the extent that insurance coverage for Section 1983 liability lessens the individual official's efforts to uphold those rights, taxpayer payment of such

insurance premiums violates the due process clause of the Fourteenth Amendment in that it is tantamount to state encouragement to ignore civil rights.

Ignoring for a moment the possibility that such coverage might be unconstitutional or illegal in some states as against public policy, it is not clear that a policy exists which will protect community college officials from liability imposed in Section 1983 suits. Conventional policies do not protect school officials personally and do not cover the expenses of attorney's fees or court costs.[114] Several insurance companies are now offering policies to cover administrators and board members for personal liability based on actions taken in the course of their official duties.[115] The actions covered include "improper dismissal, expulsion, suspension, or other violations of a person's civil rights."[116] These policies cover the costs of litigation as well as the damage awards and have liability limits ranging from $100,000 to $1,000,000.[117]

However, they often have large deductibles--up to $5,000 per loss for large school districts.[118] Presumably this deductible must be paid by the individual who suffered the damage and not by the district/board as an entity. Furthermore, they specifically exclude coverage for "willful violations of statute or ordinance if done with knowledge and consent."[119] This exclusion may provide a tremendous loophole for insurance companies if the officials are involved in Section 1983 cases. Since, after Wood, no community college official can be found liable under Section 1983 unless he had actual or constructive knowledge[120] that he was violating the plaintiff's constitutional rights, and since the Wood standard equates acting with a lack of knowledge of those rights with "willfulness," each time liability is imposed there is an implicit finding that the official willfully violated Section 1983. Therefore, unless the insurance company defines "knowledge" subjectively, the policies apparently will not cover Section 1983 liability at all.

It is possible that there are policies which cover Section 1983

liability. For purposes of this paper, no exhaustive review of insurance policies was conducted. However, it is important that any policy be read carefully before purchase and that the insurer be required to define its terms before one assumes that such liability is indeed covered.

FOOTNOTES

1. Other cases in which community college teachers have obtained reinstatement and back pay are Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir. 1975); Cal. School Employees Ass'n v. Foothill Community College Dist., 52 Cal. App. 3d 150, 124 Cal. Rptr. 830 (1975); and Francis v. Ota, 356 F. Supp. 1029 (D. Haw. 1973).

2. Endress v. Brookdale, No. L-37008-73 (N.J. Super. 1975). This case has been affirmed on appeal. However, the appellate court's opinion has not yet been published.

3. See, e.g., Blumer, D. H. Legal Liability of Community College Presidents and Board Members. Paper presented at the Annual Convention of the American Ass'n of Community and Junior Colleges, Washington, D.C., March 17-19, 1976. 16p. ED 124 221; Blumer, D. H. (Ed.) Legal Issues for Postsecondary Education. Briefing Papers I. Washington, D.C.: American Ass'n of Community and Junior Colleges, 1976. 96p. ED 115 317; Blumer, D. H. (Ed.) Legal Issues for Postsecondary Education. Briefing Papers II. Washington, D.C.: American Ass'n of Community and Junior Colleges, 1976. 93p. ED 119 758; Cox, F. L. "Colleges and the Courts," Paper presented at the "Facing the Future" Conference, Greenville Technical College, October 15-17, 1975; Miner, C. The Evolving Plight of College Administrators in the Courts. Paper presented at the Conference on Staff Reduction Policies and Practices, Washington State Univ., July 17-19, 1974. 4p. ED 095 969.

4. This statute is set forth in full and discussed in Section II of this report.

5. The United States Supreme Court has so held in City of Kenosha v. Bruno, 412 U.S. 507 (1973), and most Circuit Courts follow this interpretation. A recent decision by the Circuit Court for the Eighth Circuit, Keckeisen v. Independent School Dist. 612, 509 F.2d 1062 (8th Cir. 1975), however, is to the contrary. There, the court held that school districts are "persons" for purposes of Section 1983

suits. This means that the aggrieved teacher, administrator, or student has no need to sue community college officials as individuals if the community college is located within the Eighth Circuit.

6. U.S. CONST. amend. XI.

7. For a discussion of this extension, see Frye v. Lukehard, 364 F. Supp. 1379 (D. Va. 1973). See also Faber v. State, 143 Colo. 240, 353 P.2d 609 (1960); Lewis v. State, 96 N.Y. 71 (1884).

8. See Edelman v. Jordan, 415 U.S. 651, 663 (1974), and cases there cited.

9. It should be noted here that at least six states--Arizona, California, Illinois, Indiana, New Jersey, and Wisconsin--have specifically waived the immunity of their state offices and officials.

10. Monell v. Dept. of Social Services, 394 F. Supp. 853 (S.D. N.Y. 1975); Edelman v. Jordan, 415 U.S. 651 (1974); Ex Parte New York, 256 U.S. 490 (1921); Poindexter v. Greenhow, 114 U.S. 270 (1885); Cunningham v. Macon & Brunswick R. Co., 109 U.S. 466 (1883).

11. See Ex Parte Young, 209 U.S. 123 (1908) and Edelman v. Jordan, 415 U.S. 651 (1974). An extension of the holding in the recent case of Fitzpatrick v. Bitzer, 96 S. Ct. 2666, U.S. (1976), may change this part of Eleventh Amendment law to allow plaintiffs to recover back pay, as well as reinstatement with future pay, from the board/district itself.

12. Endress v. Brookdale, No. L-37008-73 (N.J. Super. 1975). Ms. Endress, it will be recalled, recovered both reinstatement and back pay from the board. However, New Jersey has specifically waived its immunity from suit. See note 9.

13. Local government agencies and officials are not protected by the Eleventh Amendment. Edelman v. Jordan, 415 U.S. 615, 657, n. 12 (1974).

14. Fitzpatrick v. Bitzer, 519 F.2d 559, 565 (2d Cir. 1975), reversed on other grounds, 96 S. Ct. 2666, U.S. (1976); Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974), reversed on other grounds, 421 U.S. 983 (1975); Urbano v. Board of Managers, 415 F.2d 247 (3d

Cir. 1969).

15. The Circuit Court for the 5th Circuit made such a finding in Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir. 1975). It found that in Texas a community college board is not considered to be an alter ego of the state; rather, it is local and has independent power to raise revenues and to satisfy adverse money judgments.

16. Ex Parte Young, 209 U.S. 123 (1908); Board of Trustees of Ark. A & M College v. Davis, 396 F.2d 730 (8th Cir. 1968), cert. denied, 393 U.S. 962 (1968).

17. Public officials have never been protected for torts committed outside the course and scope of their employment.

18. Barr v. Mateo, 360 U.S. 564, 571 (1959).

19. 360 U.S. 564, 565.

20. Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

21. Id.

22. In 1961, 296 cases based on Section 1983 were filed in the federal courts. In 1973, 6,133 such cases were filed there. This represents an increase of 1,972 percent. Shirott, Judge, and Bliss, Civil Rights Act: A Close Look at Proper Parties, 18 TR. LAW GUIDE 105 (1974).

23. Scheuer v. Rhodes, 416 U.S. 232, 238 (1974).

24. 42 U.S.C. Section 1983.

25. For a detailed discussion of the history of this statute, see Monroe v. Pape, 365 U.S. 167 (1961).

26. 17 Stat. 13.

27. See note 22.

28. The fact that the official's action violated state law does not mean that it was not taken "under color of state law;" as long as he acted with the apparent authority of the state, he can be sued under this statute. Monroe v. Pape, 365 U.S. 167 (1961).

29. Monroe v. Pape, 365 U.S. 167 (1961); City of Kenosha v. Bruno, 412 U.S. 507 (1973).

30. The purpose of the Act was to ensure that Blacks would not be deprived of their constitutional rights by state officials. If the

defense of official immunity could be raised by all public officials sued under the Act, the entire statute would be useless and its purpose would be thwarted.

31. Fidtler v. Rundle, 497 F.2d 794 (3d Cir. 1974).

32. Section 1983 is not a jurisdictional statute. However, under 28 U.S.C. Section 1343, the federal courts have original jurisdiction of any Section 1983 cause of action even if the matter in controversy does not exceed the sum of $10,000 as required by 28 U.S.C. Section 1331 for general federal question jurisdiction.

This does not mean that the Section 1983 plaintiff must bring suit in a federal court. The state courts are not deprived of such jurisdiction. However, as a practical matter, most Section 1983 suits are brought in federal courts. It is for this reason that we concentrate on the federal court interpretations of the appropriate immunity standard to be applied in such suits.

33. Pierson v. Ray, 386 U.S. 547 (1967).

34. Tenney v. Brandhove, 341 U.S. 367 (1951).

35. Pierson v. Ray, 386 U.S. 547 (1967).

36. Scheuer v. Rhodes, 416 U.S. 232 (1974).

37. Carter v. Carlson, 477 F.2d 358 (D.C. Cir. 1971); C. M. Clark Ins. Agency, Inc. v. Maxwell, 479 F.2d 1223 (D.C. Cir. 1973).

38. Wood v. Goodman, 381 F. Supp. 412 (D. Mass. 1974), aff'd, 516 F.2d 894 (1st Cir. 1975); Gaffney v. Silk, 488 F.2d 1248 (1st Cir. 1973).

39. Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958); Joyce v. Gilligan, 383 F. Supp. 1028, aff'd, 510 F.2d 973 (6th Cir. 1975).

40. Williams v. Gould, 486 F.2d 547 (9th Cir. 1973); Adamian v. Univ. of Nevada, 359 F. Supp. 825 (D. Nev. 1973).

41. Smith v. Losee, 485 F.2d 334 (10th Cir. 1973).

42. Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971).

43. McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); Simcox v. Board of Educ., 443 F.2d 40 (7th Cir. 1971).

44. Fidtler v. Rundle, 497 F.2d 794 (3d Cir. 1974).

45. Norton v. McShane, 332 F.2d 855 (5th Cir. 1964), cert. denied, 380 U.S. 981 (1965); C. M. Clark Ins. Agency, Inc. v. Reed, 390 F. Supp. 1056 (S.D. Tex. 1975); Ala. Optometric Ass'n v. Ala. State Bd. of Health, 379 F. Supp. 1332 (D. Ala. 1974).

46. Board of Trustees of Ark. A & M College v. Davis, 396 F.2d 730 (8th Cir. 1968).

47. Wood v. Strickland, 420 U.S. 308 (1975).

48. O'Connor v. Donaldson, 422 U.S. 563 (1975).

49. Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3d Cir. 1975), judgment vacated and remanded for consideration under Wood, 421 U.S. 983 (1975).

50. Endress v. Brookdale, No. L-37008-73 (N.J. Super. 1975).

51. Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569 (1975).

52. Hanshaw v. Del. Technical & Community College, 405 F. Supp. 292 (D. Del. 1975).

53. Phillips v. Puryear, 403 F. Supp. 80 (W.D. Va. 1975).

54. It was applied to the Superintendent of Education for the Commonwealth of Pennsylvania and to various officials of Bloomsburg State College in Skehan v. Board of Trustees of Bloomsburg State College, 421 U.S. 983 (1975). It was applied to the president of East Carolina University in the context of his having disciplined two university students because of a letter they published in the college newspaper. Thonen v. Jenkins, 517 F.2d 3 (4th Cir. 1975). It was applied to the president of Grand Valley State Colleges and to other college officials in the context of an illegal search of dormitory rooms. Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975). And, it was applied to the members of the Board of Education for the City of Chicago in the context of dismissing non-certificated personnel. Mims v. Board of Educ., 523 F.2d 711 (7th Cir. 1975).

55. Strickland v. Inlow, 348 F. Supp. 244 (W.D. Ark. 1972), reversed sub nom. Wood v. Strickland, 420 U.S. 308 (1975).

56. Strickland v. Inlow, 485 F.2d 186 (8th Cir. 1973), reversed sub nom. Wood v. Strickland, 420 U.S. 308 (1975).

57. Wood v. Strickland, 420 U.S. 308, 324-26 (1975).

58. 420 U.S. 308, 315-321.

59. 420 U.S. 308, 321.

60. 420 U.S. 308, 322.

61. The two federal courts which have considered the issue have come to different conclusions. In Zeller v. Donegal School Dist. Bd. of Educ., 517 F.2d 600, 609 (3d Cir. 1975) (Rosen, J., concurring), the concurring justice asserted that a right is not undisputed if the various federal courts are not in accord on the matter. On the other hand, Shirley v. Chagrin Falls Exempted Village Schools Bd. of Educ., 521 F.2d 1329 (6th Cir. 1975) stands for a different principle. There the court implied that if there was a decision binding in the jurisdiction in which the school was located, that decision would be considered undisputed for the purposes of Section 1983 suits involving that school.

62. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

63. Perry v. Sindermann, 408 U.S. 593 (1972).

64. 408 U.S. 564, 573-74.

65. Slochower v. Board of Educ., 350 U.S. 551 (1956).

66. Wieman v. Updegraff, 344 U.S. 183 (1952).

67. Perry v. Sindermann, 408 U.S. 593 (1972).

68. 408 U.S. 593, 599-603.

69. Wood v. Strickland, 420 U.S. 308, 322.

70. See, e.g., Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569 (1975), discussed in notes 73-81 & accompanying text.

71. Wood v. Strickland, 420 U.S. 308, 327-31 (1975) (Powell, J., dissenting).

72. 420 U.S. 308, 327-29.

73. Scheuer v. Rhodes, 416 U.S. 232 (1974).

74. Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569 (1975).

75. Hostrop v. Board of Junior College Dist. No. 515, 337 F. Supp. 977 (1972).

76. Pickering v. Board of Educ., 391 U.S. 563 (1968).

77. Hostrop v. Board of Junior College Dist. No. 515, 471 F.2d 488 (7th Cir. 1972).

78. See notes 64-70 & accompanying text.

79. Hostrop v. Board of Junior College Dist. No. 515, 399 F. Supp. 609 (1973).

80. Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569 (1975).

81. Although the Fourteenth Amendment does not guarantee that the predismissal hearing will be before anybody other than the school board, a school board may be disqualified if it is shown to be incapable of judging a particular controversy fairly on the basis of its own circumstances. Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 423 U.S. 1301 (1976).

82. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972). For a discussion of the holdings in these cases see notes 61-67 & accompanying text.

83. Id.

84. Smith v. Losee, 485 F.2d 334 (10th Cir. 1973).

85. See notes 61-67 & accompanying text.

86. It is important to remember that the Smith case was tried before the Wood decision was rendered. The Circuit Court for the 10th Circuit used the subjective "good faith" test in Smith.

87. Pickering v. Board of Educ., 391 U.S. 563 (1968). The Pickering case sets forth the First Amendment rights of public school teachers. It holds that such teachers cannot be discharged for speaking out on issues of public interest in connection with the operation of the public schools in which they work unless it can be proven that the statements they made were knowingly or recklessly false.

88. Shirley v. Chagrin Falls Exempted Village Schools Bd. of Educ., 521 F.2d 1329 (6th Cir. 1975).

89. 521 F.2d 1329, 1331.

90. Id.

91. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

92. Shirley v. Chagrin Falls Exempted Village Schools Bd. of Educ., 521 F.2d 1329 (6th Cir. 1975).

93. 521 F.2d 1329, 1334.

94. For a review of those policies, see notes 18-21 & accompanying text.

95. The text of Section 1983 is set forth at the beginning of Section II of this report.

96. The facts of Endress v. Brookdale are set forth in the Introduction of this report.

97. The facts of Smith v. Losee are set forth in notes 83-84 & accompanying text.

98. Cohen v. Ill. Inst. of Technology, 524 F.2d 818 (7th Cir. 1975).

99. Greenya v. George Washington Univ., 512 F.2d 566 (D.C. Cir. 1975).

100. Hanshaw v. Del. Technical & Community College, 405 F. Supp. 292 (D. Del. 1975).

101. Endress v. Brookdale, No. L-37008-73 (N.J. Super. 1975).

102. People ex rel. Underhill v. Skinner, 74 App. Div. 58, 77 N.Y.S. 36 (1902).

103. 74 App. Div. 58, 61-62, 77 N.Y.S. 36, 38 (1902).

104. See, e.g., Emington v. Mansfield Township Bd. of Educ., 42 N.J. 320, 200 A.2d 492 (1964).

105. Fleishman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967).

106. F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 (1974).

107. Hall v. Cole, 412 U.S. 1 (1943).

108. Stolberg v. Members of Board of Trustees for State Colleges of Conn., 474 F.2d 485 (2d Cir. 1973).

109. Hostrop is discussed in notes 73-81 & accompanying text.

110. Blumer, D. H. (Ed.) Legal Issues for Postsecondary Education.

Briefing Papers I. Washington, D.C.: American Ass'n of Community and Junior Colleges, 1976. 96p. ED 115 317. P. 23.

111. Id.

112. Id.

113. Smith v. Losee, 485 F.2d 334, 349 (10th Cir. 1973) (Barrett, C.J., concurring in part and dissenting in part).

114. Spivey, C. J. "Personal Liability Insurance: What You Need, What You Can Get." Nation's Schools, 93 (5): 40-41; May 1974.

115. Id.

116. Id.

117. Id.

118. Id.

119. Id.

120. "Constructive knowledge" is a legal concept. It charges a person with knowledge he did not have on the theory that he should have had it. This is the principle embodied in the Wood standard. Liability will be imposed on a school official if he violates an "undisputed" (i.e., "knowable") constitutional right of the plaintiff. As long as the right is undisputed, the official is charged with knowledge of it, whether he actually knew of it or not. Thus, his action in derogation of that right becomes a "willful" violation.

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